# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 205.

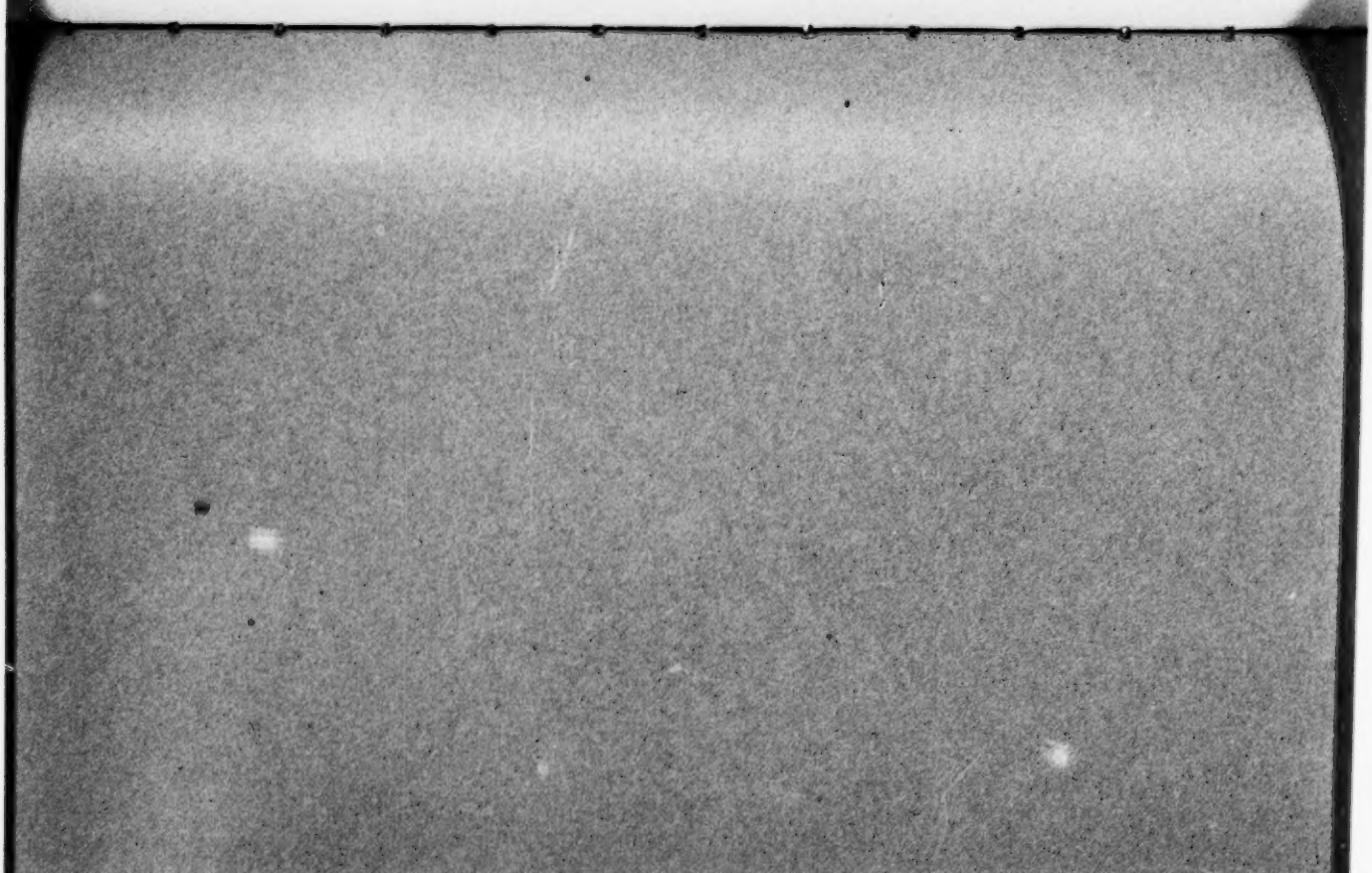
THE UNITED STATES, APPELLANT,

vs.

ALPHONSE GAY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 27, 1923.



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1 Court of Claims.

ALPHONSE GAY,
*vs.*
THE UNITED STATES. } No. 33756.

I. *History of proceedings.*

On May 24, 1917, the plaintiff filed his original petition.

On October 26, 1918, by leave of court, the plaintiff filed his amended petition.

On November 18, 1921, by leave of court, the plaintiff filed his second amended petition which is as follows:

2 II. *Second amended petition.*

Filed Nov. 18, 1921.

*To the Honorable the Court of Claims:*

The claimant, Alphonse Gay, respectfully represents:

I. The claimant after 13 years 6 months and 10 days of service as an enlisted man in the Navy, was, on the 6th day of July, in the year 1899, appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist, and remained on the active list in the performance of duty as such until the 23d day of November, 1908, when he was retired from active service on account of an incapacity resulting from an incident of the service, and was thereafter paid at the rate of $1,687.50 a year, as provided by law.

II. He continued to be so paid until the 30th day of April in the year 1916. From and after the first of May, 1916, he has received no pay whatever, and upon inquiry was informed by the paymaster that his pay was stopped by orders from the Navy Depart-

3 ment. He promptly protested in writing to the Chief of the Bureau of Navigation of the Navy Department against the stoppage of his pay and requested that it be resumed. He received no response whatever to his communication. Thereafter his name appeared in the officially published Register of the Navy of officers in the service January 1, 1917, but without his receiving any pay. After the outbreak of war he notified the Navy Department that he was ready for any duty on sea or shore but without receiving any response to his said notices. He has never been notified of any charge against him or that he has been dismissed or dropped from the rolls of the Navy.

III. He therefore claims pay as a retired machinist of the Navy from May 1, 1916, to September 30, 1921.

IV. This claim is made under the following provisions of statute: Revised Statutes, secs. 1405, 1406, providing for the appointment of warrant officers.

Sec. 1453, providing for retirement for incapacity resulting from an incident of the service.

Sec. 1556, fixing the pay of warrant officers.

Sec. 1558, allowing to officers retired 75% of the sea pay of their grade.

Act of March 3, 1899, Navy personnel act, secs. 14 and 15 (30 Stat. 1007, 1008) creating the office of warrant machinist with the same pay and right of retirement as other warrant officers.

Act of May 13, 1908 (35 Stat. 128) increasing the pay of all warrant officers 25%.

4 Act of March 3, 1909 (35 Stat. 771) changing the title of warrant machinist to machinist.

Revised Statutes, sec. 1229, providing that no officer of the military or naval service shall in time of peace be dismissed from the military or naval service except in pursuance of a sentence of court-martial to that effect.

Revised Statutes, sec. 1624, being the Articles for the Government of the Navy, Article 36 of which provides: "No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

Article 64 of said Articles for the Government of the Navy provides that "officers shall mean commissioned and warrant officers," etc.

V. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims nine thousand one hundred twenty-seven dollars and sixty-two cents ($9,127.62.)

KING & KING,
*Attorneys for Claimant.*

5 DISTRICT OF COLUMBIA, *ss:*

George A. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 17th day of November, 1921.

MAY LOU H. BYINGTON,
[SEAL.] *Notary Public, D. C.*

III. *General traverse.*

No demurrer, plea, answer, counter-claim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and submission of case.*

On May 29, 1922, this case was argued and submitted by Mr. George A. King, for the plaintiff, and by Mr. John G. Ewing, for the defendant.

V. *Order allowing filing of supplemental petition.*

Entered June 12, 1922.

It appearing that the judgment this day entered in this case is in excess of the amount claimed in the petition, it is ordered by the court that the plaintiff have leave to file a supplemental petition bringing the amount down to date.

VII. *Supplemental petition.*

(Filed by leave of court, June 12, 1922.)

*To the Honorable the Court of Claims.*

The claimant, Alphonse Gay, respectfully represents:

I. The claimant after 13 years 6 months and 10 days of service as an enlisted man in the Navy was, on the 6th day of July in the year 1899, appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist, and remained on the active list in the performance of duty as such until the 23d day of November, 1908, when he was retired from active service on account of an incapacity resulting from an incident of the service, and was thereafter paid at the rate of $1,687.50 a year, as provided by law.

II. He continued to be so paid until the 30th day of April in the year 1916. From and after the first of May, 1916, he has received no pay whatever, and upon inquiry was informed by the paymaster that his pay was stopped by orders from the Navy Department. He promptly protested in writing to the Chief of the Bureau of Navigation of the Navy Department against the stoppage of his pay and requested that it be resumed. He received no response whatever to his communication. Thereafter his name appeared in the officially published register of the Navy of officers in the service January 1, 1917, but without his receiving pay. After the outbreak of war he notified the Navy Department that he was ready for any duty on sea or shore but without receiving any response to his said notices. He

has never been informed of any charge against him or that he has been dismissed or dropped from the rolls of the Navy.

III. He therefore claims pay as a retired machinist of the Navy from May 1, 1916, to June 12, 1922.

8 IV. This claim is made under the following provisions of statute:

Revised Statutes, secs. 1405, 1406, providing for the appointment of warrant officers.

Sec. 1453, providing for retirement for incapacity resulting from an incident of the service.

Sec. 1556, fixing the pay of warrant officers.

Sec. 1558, allowing to officers retired 75% of the sea pay of their grade.

Act of March 3, 1899, Navy personnel act, secs. 14 and 15 (30 Stat. 1007, 1008), creating the office of warrant machinist with the same pay and right of retirement as other warrant officers.

Act of May 13, 1908 (35 Stat. 128), increasing the pay of all warrant officers 25%.

Act of March 3, 1909 (35 Stat. 771), changing the title of warrant machinist to machinist.

Revised Statutes, sec. 1229, providing that no officer of the military or naval service shall in time of peace be dismissed from the military or naval service except in pursuance of a sentence of court-martial to that effect.

Revised Statutes, sec. 1624, being the Articles for the Government of the Navy, Article 36 of which provides: "No officer shall be dismissed from the naval service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

Article 64 of said Articles for the Government of the Navy provides that "officers shall mean commissioned and warrant officers," etc.

9 V. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all time borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claim ten thousand three hundred and two dollars and fifty-two cents ($10,302.52).

KING & KING,
*Attorney for Claimant.*

DISTRICT OF COLUMBIA, *ss:*

George A. King, being duly sworn, depos[illegible] and says: I am one of the attorney for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information, and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 12th day of June, 1922.

[SEAL.] MARIE A. SEARLES,
*Notary Public, D. C.*

10 VIII. *Findings of fact, conclusion of law, and opinion of the Court.*

Entered June 12, 1922.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff, Alphonse Gay, after serving 13 years 6 months and 10 days as an enlisted man in the Navy, was, on the 6th day of July, 1899, appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist, and remained on the active list in the performance of duty as such until November 23, 1908, when he was retired from active service on account of an incapacity, to wit, deafness, resulting from an incident of the service. In 1907 he received a medal granted under the act of March 3, 1901, in recognition of his service on board the U. S. S. Cincinnati at the Battle of Matanzas, Cuba, April 27, 1898.

II.

The plaintiff was born in Switzerland on May 19, 1856. He was admitted to citizenship of the United States by the United States District Court for the Eastern District of New York August 4, 1897. He has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy.

III.

After his retirement from active service in the United States Navy he was, on August 9, 1909, granted permission to leave the limits of the United States for a period of one year from September 16, 1909. August 17, 1910, he was authorized to remain abroad for one year from September 16, 1910. September 12, 1911, he was authorized to remain abroad for a period of one year from September 17,
11 1911. August 30, 1912, he was authorized to remain abroad beyond the limits of the United States indefinitely.

In accordance with the permission so given him he has been residing at several places in Switzerland, and has kept the Bureau of Navigation informed of his address by letters written annually or oftener, as required by Articles 704, 705, 706, Naval Instructions, 1913. He made one or more affidavits of continued American citizenship before the American consul at Geneva.

He was registered as an American citizen at the American consulate at Geneva. A registration certificate was furnished to the plaintiff and showed that he was at that time living at Clos des Cretes, Clarens, Switzerland. On November 25, 1912, the plaintiff called at the U. S. consulate at Geneva and requested a renewal of his registration certificate. The vice consul informed him that since he had lived over two years in Switzerland, the country of his birth, he would have to sign an affidavit to overcome the presumption of expatriation. The plaintiff duly signed such affidavit and on November 26, 1912, he called again at the consulate and asked that the affidavit be not sent to the Department of State.

January 11, 1916, he was officially notified by the Director of Naval Intelligence, Navy Department, by a letter addressed to him in Switzerland, that he had been slated for duty in connection with that office in time of war and was requested in case of return to the United States and to Washington to call at the Office of Naval Intelligence, but "should you remain abroad indefinitely, and opportunity offer, it is requested that you confer with the naval attaché at Paris."

He received this letter though the naval attaché at Paris, who transmitted the same to him January 25, 1916, with a request to acknowledge receipt.

January 28, 1916, plaintiff acknowledged receipt to said naval attaché.

February 24, 1916, the Chief of the Bureau of Navigation of the Navy Department addressed him a copy of General Instructions issued to naval officers abroad directing them to notify the accredited U. S. naval attaché of their presence, address, and probable length of stay, etc., or if in countries or colonies to which no naval attaché is accredited, to make similar report to the nearest U. S. naval attaché practicable.

March 15, 1916, in accordance with this order, claimant notified the naval attaché at Paris, giving particulars in regard to his residence, and expressing himself as ready and willing to leave Switzerland whenever recalled to the United States by the Navy Department.

March 17, 1916, the naval attaché acknowledged receipt of his letter of March 15, 1916, stating:

"2. In case you are in the vicinity of Paris, I would be greatly obliged if you would call at the embassy in order to receive certain confidential information which I have been directed by the Navy Department to furnish you.

"3. There is no immediate necessity of your coming to Paris at present."

June 19, 1916, and again July 25, 1916, he was notified by the pay officer of the New York Navy Yard, who had been carrying his accounts and paying him his monthly retired pay, that said pay officer had been directed by the Navy Department to make no further payments to him.

September 1, 1916, he wrote the Chief of the Bureau of Navigation, Navy Department, Washington, D. C., reciting this information from the pay officer and respectfully requesting to be informed of the reason for that action, and stating that he was ready to answer at any time for his action. No response seems ever to have been made to this letter.

November 12, 1917, he wrote the Bureau of Navigation stating that he was able to perform sea or shore duty; that his health was in very good condition, and that the deafness for which he was retired was improving; that he could speak French fluently; and that a call to any duty to which the department would see fit to assign him would be gladly received.

It was officially stated by the Director of Naval Intelligence, December 14, 1917, "There is at present no duty in this office to which the above subject might be assigned."

His name appears continuously in the officially published annual "Register of the Commissioned and Warrant Officers of the Navy and Marine Corps" down to and including that of January 1, 1917, where he is carried as a machinist on the retired list of the Navy, and, under the column "Present residence or duty," he is listed, "Abroad."

It does not appear by what authority his name was omitted from the register.

## IV.

He has been paid as a machinist on the retired list of the Navy of maximum length of service at the rate of $1,687.50 a year from the time of his retirement to and including April 30, 1916, since which date he has received no pay. If claimant is entitled to pay as a machinist on the retired list from May 1, 1916, to June 12, 1922, there would accrue to him $10,302.52.

### CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plantiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of ten thousand three hundred and two dollars and fifty-two cents ($10,302.52).

### OPINION.

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the retired pay of a machinist in the Navy, the plaintiff having been retired as a ma-

chinist on November 23, 1908. He was paid his retired pay from the date of his retirement up to May 1, 1916, but since that date his retired pay has been withheld, and he alleges that there is now due him the sum of $10,078.90. He was notified on June 19 and July 25, 1916, by the pay officer of the New York Navy Yard, that that officer had been directed by the Navy Department to make no further payment to him. On September 1, 1916, he wrote to the Chief of
13 the Bureau of Navigation, Navy Department, Washington, D. C., requesting to be informed why his pay had been stopped. To this letter no response was made, and on May 24, 1917, he brought this suit in this court.

The effect of this action of the Navy Department was to remove the plaintiff from his position as a retired officer of the Navy and to deprive him of his rights as such and of the emoluments guaranteed him as such retired officer without giving him an opportunity to be heard. The reasons given for this action by the Navy Department are that the plaintiff under the act of March 2, 1907, should be officially regarded as having expatriated himself; and that having so expatriated himself the plaintiff had abandoned his office as a machinist in the Navy in view of the requirement of the law and regulations that officers of the Navy must in all cases be citizens of the United States. It will be observed that these reasons and conclusions were never communicated to the plaintiff, and he was given no opportunity to make answer to them.

The provision of the statute under which the Navy Department held that the plaintiff had expatriated himself is as follows (34 Stat. 1228):

"SEC. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he had taken an oath of allegiance to any foreign State.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when his country is at war."

The act is entitled "An act in reference to the expatriation of citizens and their protection abroad." The purpose of the act is to relieve the Government of the obligation to protect citizens residing abroad after the limit of two or five years, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States. After the time limit has expired it is presumed that the citizen does not intend to return, and it is necessary, in order that he may have

the protection of this Government, for him to show affirmatively that it is his bona fide intention to return to the United States to live. The essential thing under the act is the intention to return to and reside in the United States. Op. Atty. Gen. 28, 504, 508, 509. The provisions of the act are penal and are not to be extended to include any person not within its purview.

From the facts proved it appears that the plaintiff does not come within the provisions of the act. He was an officer of the United States Navy who went abroad with the permission of the Navy Department; that permission was repeatedly renewed, and while living in Switzerland under this permission of the department his pay as such officer is taken from him without any reason there-
14 for being given to him. It is true that, acting upon the opinion of a subordinate office of the department that he had expatriated himself, his pay was stopped. But all the facts in the case were apparently not submitted to the department, and even if they had been we are of opinion that it was not in the province of the Navy Department, or of any of its officers, to pass upon the rights of the plaintiff and to declare that he had expatriated himself, and thereby to dismiss him from the Navy, and take from him his retired pay to which he was entitled under the law, and which he had earned by long active service in the Navy. The act of March 2, 1907, was only intended to authorize the State Department to refuse to extend its protection to citizens who, having remained in a foreign country two or five years continuously, failed to satisfy the officers of the State Department that they intended to return to and reside in the United States. The act does not affect any other right.

In the case at bar the plaintiff, when his attention was called to the fact that he had resided in Switzerland, the country of his birth, for more than two years continuously, promptly made the affidavit required of him by the consular officer. He complied with the law, although he might well have insisted that he did not come under its provisions, and having complied with it, and rebutted the presumption raised by the statute, he can not now be held to have expatriated himself. He presented satisfactory evidence to a consular officer of the United States of his intention to return to and live in the United States.

The fact that the affidavit was not sent to the Department of State has nothing to do with its force and effect, for, as far as this record shows, it was not necessary to its validity that it should be forwarded to the department. Having once made the affidavit it was not necessary under the provisions of the act to make one every two years.

The facts show that the plaintiff intended to return to the United States to live; and moreover, it is shown that the plaintiff when war was declared promptly tendered his services to his Government.

The court is of opinion that the plaintiff has not expatriated himself, and is still a citizen of the United States. He is therefore

entitled to all his rights as such, and is entitled to his pay as a retired officer of the Navy from May 1, 1916, up to the present time.

The defendant's attorney has asked us to make certain findings based upon affidavits made by certain officers of the Government. These affidavits are merely ex parte statements and are not competent evidence. The persons who made the affidavits could have been examined by the defendant. The fact that they were not leaves the court to infer that the evidence which they might have given would not have stood the test of scrutiny. At all events there is no reason to depart from a long and well established rule.

For the reasons above given the court is of opinion that the plaintiff is entitled to recover. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

15 IX. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the twelfth day of June, A. D. 1922, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of ten thousand three hundred and two dollars and fifty-two cents ($10,302.52).

BY THE COURT.

X. *Proceedings after the entry of judgment.*

On September 9, 1922, the defendant filed a motion for new trial under section 175 of the Judicial Code.

On October 16, 1922, said motion for new trial was overruled by the court.

XI. *Defendant's application for an allowance of appeal.*

Filed Dec. 26, 1922.

From the judgment rendered in the above-entitled cause on the 16th day of October, 1922, in favor of claimant, the defendants, by their Attorney General, on the 23rd day of December, 1922, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
J. G. E. *Assistant Attorney General.*

*Order allowing appeal.*

It is ordered by the court that the defendant's application for appeal in this cause be and the same is allowed.

BY THE COURT.

January 15, 1923.

16 Court of Claims.

(Title omitted.)

*Clerk's certificate.*

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court; of the judgment of the court; of the defendant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this twentieth day of January, A. D. 1923.

[SEAL.]

F. C. KLEINSCHMIDT,
*Assistant Clerk, Court of Claims.*

(Indorsed on cover:) File No. 29364. Court of Claims.—Term No. 205. The United States, appellant, vs. Alphonso Gay. Filed January 27th, 1923. File No. 29364.)

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